85-1856

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM. 1985

JAYCO SYSTEMS, INC.,

Petitioner,

v.

SAVIN BUSINESS MACHINES CORPORATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied a new Rule 56 standard in determining that the Petitioner did not have antitrust standing to challenge an admitted governmental bid-rigging. (15 U.S.C. §1).

2. Whether the Court of Appeals properly applied a new Rule 56 standard in determining that the unique Statewide purchasing procedures for photocopiers and supplies by the many State of Texas independent agencies, respectively, did not constitute a relevant submarket for antitrust analysis. (15 U.S.C. §§1,2).

3. Whether the Court of Appeals erred in determining that the rule of reason rather

than the per se rule applied in circumstances involving bid-rigging, price-fixing and agreements not to compete for Texas governmental copier business by a combination involving: (1) copier dealers, some of whom otherwise competed in the copier market; (2) the supplier Savin Corporation; and (3) State of Texas officials. (15 U.S.C. §1).

4. Whether the Court of Appeals properly applied a new Rule 56 standard in failing to render Summary Judgment on antitrust claims for the Petitioner in view of: (1) undisputed admissions by conspirators of their personal participation in the bid-rigging; (2) undisputed interest and uncontroverted preparedness on the part of the Plaintiff to participate in bidding for

the Texas state governmental convenience copier or supply business; (3) uncontroverted expert opinion on the extent of damages incurred by the Petitioner as a result of the bid-rigging by the Savin Corporation and others in conspiracy with it. (15 U.S.C. §1,2).

PARTIES BELOW

In the Court below, the Petitioner, Jayco Systems, Inc. was Appellant. The Respondent, Savin Business Machines Corporation, was Appellee.

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No.

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OCTOBER TERM, 1985

JAYCO SYSTEMS, INC.,

Petitioner,

v.

SAVIN BUSINESS MACHINES CORPORATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Jayco Systems, Inc. (hereinafter "Jayco") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS AND JUDGMENT BELOW

The Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing En Banc on January 29, 1986. The Court of Appeals decision was rendered on November 29, 1985. The Final Judgment of the District Court was rendered on July 6, 1984.[1]

JURISDICTION

The Order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc was entered on January 29, 1986. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

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[1]Ex. A, B, C. [All references herein to supporting documentation in the Appendix shall be cited as: Ex. '___'.]

United States Code, Title 15

Monopolies And Combinations In Restraint Of Trade, 15 U.S.C. §§1,2.

15 U.S.C. §1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal...."

15 U.S.C. §2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the States or with foreign nations...."

Rule 56, Federal Rules of Civil Procedure

* * *

"(c) Motion and Proceedings Thereon....the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...

* * *

(e) Form of Affidavits; Further Testimony; Defense Required...When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

STATEMENT OF THE CASE

This is a blatant bid-rigging case involving the sale and rental of convenience copiers and supplies to the many State of Texas agencies located throughout the State of Texas.[2]

Savin Business Machines Corporation, now known as Savin Corporation (hereinafter "Savin"), is a nationwide supplier of photocopiers, parts and supplies. It operates as a wholesaler to its independent Savin dealers. Savin retails: (1) to many major accounts; and (2) through its local branch operations. Savin's sales to independent Savin dealers, such as Jayco, are for resale, rental or

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[2]Other issues concerning the parties' common law claims have been resolved through a compromise and they are no longer a part of this litigation.

leasing to end users. The sale or rental of Savin copiers and supplies to the various State of Texas agencies involved Savin's role as both retailer and wholesaler.

The State of Texas through its State Purchasing Commission (hereinafter "SPC") monitors the pricing of goods and services through competitive bidding procedures. The SPC procedures strive to provide various goods and services at the lowest consumer costs. The various State agencies should be able to rely on the SPC procedures to provide them with "the most for their money." Nonetheless, the various agencies, respectively, through rules and regulations, retain the right to exercise independent purchasing discretion, whether the desired supplier is

"on the contract" or "off the contract."[3]

Each State of Texas governmental agency acquires goods and services through the SPC in two (2) ways. First, the particular agency may elect to acquire "a contract" good or service. If so, the agency need only contact the SPC for that particular good or service. Second, the agency may also seek goods or services through an "open market" request. In such an event, the SPC requests bids from those vendors on its bid list and the lowest bid satisfying the bid specifications is supposed to be awarded the contract. Thus, the State of Texas copier business consists of the acquisition or rentals of either copiers

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[3]Ex. D at 45-48; Ex. E at 29-30.

or supplies under: (1) the annual contract; or (2) the "open market" requests.

The bidders for the State of Texas annual contracts or "open market" requests must follow very rigid vendor requirements in this special market. General retail suppliers are rarely on the active bid list and are not a factor in this submarket. Vendors for State of Texas business must request to be placed on the bid list. Thereafter, they must periodically submit bids in order to remain on the active list. Vendors must respond to bids with conforming equipment. Bid winners are often required to post performance bonds to assure contract performance. Only a handful of potential vendors in the State of Texas have ever bid for these governmental

copier contracts, reflecting the restrictive nature of the submarket.

A vendor's success on an annual machine rental bid is very dependent upon the correlative bid for copier supplies. Awards are made on the basis of the "lowest cost per copy" formula which incorporates the cost of copier supplies with the copier rental bid.

On the other hand, "open market" bid requests may be issued for either, or both, the copier and supplies. Such an "open market" bid contemplates a single transaction.

It is critical to understand that the SPC, although processing and evaluating contract bids, does <u>not</u> purchase copier

equipment or supplies for the individual agencies. Each individual agency has its own budget, and exercises its own purchasing discretion. The SPC simply provides a centralized bidding procedure. The Court of Appeals appeared to misunderstand the role of the SPC. The State of Texas governmental copier market is not a single purchaser. Instead, it consists of many individual agency purchasers.

Immediately after being appointed as an independent Savin dealer in late 1974, Jayco evidenced its interest and ability to participate in the State of Texas copier business by being placed upon the SPC bid list. Jayco thereafter submitted bids for both: (1) the annual convenience copier rental

contracts; and (2) "open market" bid requests.[4]

In 1975, Jayco was the only Savin dealer to bid the Savin bond copier for the annual copier rental contracts. Jayco bid the unmerchantable, unreliable Model 300,[5] as the Model 750 was not available for the 1975 bid.

By mid-1975, however, Jayco was successful in obtaining an "open market" contract award for approximately $200,000.00 of copiers to be placed throughout the State of Texas. Jayco successfully placed the machi-

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[4]Ex. F at 47-52; Ex. G at 7-11; Ex. H at 28-31, 44.

[5]The Court of Appeals recognized the Model 300 as the copier industry's version of the Edsel. Jayco Systems v. Savin Business Machines Corp., 777 F.2d 306, 308 (5th Cir. 1985); See Ex. G at 3-6; Ex. F at 51-52.

nes and established copier service locations where necessary. Jayco did not bid Savin copiers because bid specifications required that the particular copier accommodate "11 x 17" documents.[6]

In 1975, Jayco also determined that it should bid the new, revolutionary Model 750 for the 1976 annual copier rental bids. Savin initially committed to support Jayco's bidding plans. Without explanation, however, Savin turned inexplicably cold over the next several months.[7] Thereafter, Jayco was told that Savin would not commit sufficient Model

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[6]Ex. J at 4-5 (Model 300's incompatible)

[7]Ex. F at 52-54, 82; Ex. I at 3-5; Ex. J at 3-6.

750 machines to support a Jayco bid.[8]

With Jayco eliminated from the bidding process, Savin did submit a bid on the annual copier rental contracts in June of 1976. That bid was accomplished through a non-competition combination with various Savin dealers and State of Texas officials.[9] In that regard, Savin management personnel testified that independent Savin dealers were admonished not to "rock the boat." More specifically, any independent Savin dealer who dared to compete, was threatened with immediate termination. Specific instances were related by Savin personnel.[10]

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[8]See note 7 supra.

[9]Ex. G at 7-11; Ex. I at 11-14; Ex. K at 2-27; Ex. L at 3-9; Ex. M at 4-19.

[10]Ex. N at 31-34; Ex. L at 4-8, 11-12; Ex. K at 10-11, 16-18, 22, 25-26; Ex. M at 10-11.

Jayco was also precluded from bidding for the "open market" bid requests, because of the same threats of termination. A former Savin manager reported that an El Paso Savin dealer tried to bid Savin copiers on an "open market" bid. The former Savin District Manager admitted traveling to the dealer's location and threatening the independent dealer with termination solely because of making a bid submission.[11] The witness told the El Paso dealer that if he did it again, Savin would "cut his n_ts off."[12] A more pernicious economic policy is difficult to fathom.

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[11]Ex. N 31-34; Ex. See Note 10 supra.

[12]Ex. N at 34.

Because of the threats and the exclusionary conduct of the Savin group, Jayco was unable to bid for either the annual copier rental contracts or the "open market" bid request in 1976.[13]

The absence of meaningful interbrand competition in the Texas State governmental copier business casts greater light on the nature of the restraints imposed. According to Savin witnesses, Savin dealers, and the Savin State of Texas Contract Manager, there was no effective competition for the Savin Model 750 in 1976 or for several years thereafter. According to witnesses, the only real competition for the Savin Model 700

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[13]Ex. G at 5-6.

Series was between Savin dealers or the Savin Corporation.[14]

The Model 750 was a low-cost, reliable and dependable convenience copier with which no other make could compete. Savin witnesses and the leading market research authorities, such as Data Quest, identified Savin as number one (1) in the country by 1978-79 in copier placements, outplacing I.B.M. and Xerox combined, as a result of the revolutionary Model 750. [15]

The Court of Appeals erroneously inferred that Data Quest was a mere advertisement.

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[14]Ex. K at 4, 17-25; Ex. L at 17-18; Ex. P at 102-05.

[15]Ex. L at 17-18; Ex. P at 103-05.

Jayco Systems, supra at 309, 309-310 n.7 It is not. Data Quest is a leading copier industry market research resource. Thus, a Data Quest confirmation of Savin's market power is significant, indeed.

Savin dominated the State of Texas governmental business, just as it dominated the rest of the country. The Court below, however, was preoccupied with the "fate" of Savin's competitors.[16] The demise of interbrand competition is simply explained by the unparalleled success of Savin's Model 750 and the "assistance" of some State of Texas officials. Savin extended that copier market dominance to the control of many independent Savin dealers who otherwise competed.[17]

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[16]Jayco Systems, supra at 320 n.48.

[17]Savin Dealers continued to compete on

Savin's State of Texas copier business Contract Manager, Ms. Mary Wilson, testified that the union of Savin's product dominance, dealer restraints and its abnormally close relationships with some State officials, enabled Ms. Wilson to successfully submit bids for as much as twice the price of the same equipment available in the general retail market. Incredibly, Ms. Wilson testified that she nonetheless prevailed on not less than 95% of the "open market" bids in this special submarket.[18]

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other State of Texas business which posed no conflict with the controlled annual rental and open market convenience copier bid contracts. Ex. L at 7 (otherwise, fierce competitors).

[18] Ex. M at 19-20.

Jayco was not the only loser in this submarket. The taxpayers of the State of Texas were cheated each time that the Savin conspiracy received supracompetitive prices for copiers and supplies. The antitrust laws were enacted to prevent the success of such concerted, illicit market manipulations.

REASONS FOR GRANTING THE WRIT

I.

The Decision Of The Court Of Appeals For The Fifth Circuit Implemented A New Rule 56 Standard In Conflict With Matsushita Elec. Indus. Co. v. Zenith Radio, ____ U.S. ____, 106 S.Ct. 1348, ___ L.Ed.2d ___ (1986); First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); Poller v. CBS, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

The Court of Appeals recited well-established standards for reviewing a motion for summary judgment. The Court noted that the pleadings and accompanying evidentiary materials must be viewed in the light most favorable to the non-moving party, Jayco. Jayco Systems, supra at 308-09. Nonetheless, the Court chose to view disputed material facts in the light most favorable to the movant, Savin.

The unjust result of the Court's failure to follow its own standards resulted in rewarding an unabashed antitrust conspiracy. The Court of Appeals erred because of its failure to adhere to the guidance provided in First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 20

L.Ed.2d 569 (1968). The Supreme Court in the First National Bank of Arizona case recognized that the antitrust plaintiff could not rely merely on its pleadings in the face of sworn denials and evidence which constituted a "properly supported summary judgment motion." Id. at 1592-93.

Critically, the Rule 56 standard shifts the burden of producing evidence to the non-movant only after the movant conclusively demonstrates the facts upon which it relies. Id. at 1593. Once the movant has conclusively demonstrated the existence of certain facts which reject the complaint's allegations, it is only then that the non-movant must present "any significant probative evidence to defeat the motion." Id.

In the Fifth Circuit, past panels have held that the non-movant need only "offer evidence that goes beyond unsupported conjecture." Walker v. U-Haul Co. of Miss., 734 F.2d 1068, 1072 (5th Cir. 1984); accord, Parsons v. Ford Motor Co., 669 F.2d 308, 313 (5th Cir.), cert. denied, 458 U.S. 832, 103 S.Ct. 73, ___ L.Ed.2d ___ (1982). In spite of that reasonable threshold, the Court of Appeals in this case ignored its own standards: (1) it weighed questions of fact; (2) it made factual determinations; (3) it rejected unchallenged summary judgment evidence; and (4) it overlooked its duty to view the summary judgment record in the light most favorable to the non-movant, Jayco. The Fifth Circuit acted contrary to its own established dogma that Courts must not

resolve factual disputes on summary judgment which rightfully belong in the province of the jury. See Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980).

Finally, this is not a case in which the Court of Appeals has questioned the existence of an antitrust conspiracy. To the contrary, the Court below noted that the facts presented "a fertile field to hoe." Jayco Systems, supra at 308. Respectfully, the Court of Appeals never found the forest, because it embarked upon erroneous procedural trails.

A.

The Court Of Appeals Improperly Applied A New Rule 56 Standard In Determining That Jayco Did Not Have Antitrust Standing To Challenge An Admitted Governmental Bid-Rigging.

The Court of Appeals conceded that Jayco's claimed injuries, if any, were "antitrust injuries." Jayco Systems, supra at 313. Nonetheless, the Court of Appeals rejected, in general, Jayco's §1 claims on the basis of standing.

The Court held that Jayco had to demonstrate: (1) that it intended to bid on the State copier contracts; and (2) that it was prepared to bid on the contracts. The Court rejected Jayco's claims on the basis that Jayco "[f]ailed to show that it was able and prepared to obtain financing in 1976." Id. at 315-16. In order to reach its conclusion, the Court resorted to bizarre evidentiary gymnastics.

First, as to the "financial preparedness"

issue, the Fifth Circuit discussed only the statewide annual rental copier contracts. Specifically, the Court did not deny Jayco's standing to pursue relief for damages in the "open market" rental or sale of copiers and supplies. Id. at 314. It states that Jayco demonstrated such standing. Inexplicably the Court ignored that fact in regard to "open-market" sales in order to reach its inconsistent conclusion that, generally, Jayco lacked standing.[19]

Second, in rejecting Jayco's standing, it improperly spurned the expert opinion of Ms. Colleen Collins, a former Senior Vice-President of Mercantile Dallas Bank (now,

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[19]The Court does, however, deny Jayco's standing to challenge restraints on the annual supply bid, only. Yet, Jayco did not bid solely because of Savin's threats. Ex. G at 8-10; Ex. I at 11-14; supra 14-17.

"MBank"). The Court acknowledged her opinion that Jayco was financially prepared, but ruled it was not "significant evidence."

The Court of Appeals attacked Ms. Collins' opinion that she would have extended the necessary credit to Jayco Systems on the following basis:

> (1) No evidence that Ms. Collins considered the likelihood of copier placements;
>
> (2) No evidence that Ms. Collins considered the "return policy" of copiers on the State Contract;
>
> (3) That Ms. Collins must not have considered Jayco's repayment history with Canon or Savin which had been described as "good" and "generally satisfactory," respectively, in reaching her opinion that Jayco's and the Woznick's creditworthiness was "excellent;" and,
>
> (4) On the Court's speculation that the profitable history of the contract rested "in all probability on Savin's own effort."

Jayco Systems, supra at 315.

The Fifth Circuit, indeed, indulged inferences. However, it established a new standard of indulging inferences in favor of the movant, the wrong party. Ms. Collins' expert opinion was further criticized because Savin failed to subject her opinion to cross-examination. Id. at 315. It is preposterous that the movant in a summary judgment motion should be rewarded for not deposing the non-movant's expert. Yet, the Fifth Circuit blessed Savin with favorable inferences for not deposing Ms. Collins.

While the Court of Appeals improperly speculated on Ms. Collins' opinion, she expressly testified that:

(1) Ms. Collins received her M.B.A. from Columbia University in New York City;

(2) Ms. Collins thereafter performed executive banking functions at Citicorp in New York and MBank in Dallas where she served as the Chairman of the Private Banking Loan Committee;

(3) In evaluating Jayco, Ms. Collins personally conferred with Mr. Woznick and Jayco's banker from the First National Bank of Dallas (now, InterFirst Bank);

(4) Ms. Collins reviewed profitability and financial summaries specially prepared by Touche, Ross & Co., a Big-Eight accounting firm. The data utilized by Touche, Ross & Co. reflected the revenues and placements from Savin's own records;

(5) Ms. Collins also reviewed Jayco's actual costs ratios in its day-to-day business, as well as other financial statements which she deemed material;

(6) Ms. Collins reviewed Jayco's payment record to the First National Bank and its credit exposure in other regards;

(7) Finally, Ms. Collins evaluated the State of Texas contracts, records

> and financial requirements necessary to underwrite the State of Texas copier business.[20]

Ms. Collins' opinion, based upon her banking expertise and detailed factual investigation, was that any competent banker would have granted Jayco the financing it needed in order to undertake the business. In sum, Ms. Collins considered them to be excellent banking prospects.[21]

Ms. Collins presented the Court with a well-reasoned expert opinion, based upon reliable factual data. Yet, the Fifth Circuit rejected her unchallenged opinion in favor of the Panel's own speculation.

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[20] Ex. Q at 1-9.

[21] Note 20 supra.

The Court of Appeals also placed unreasonable reliance on Mr. Woznick's refusal to join the conspiracy. Rather than demonstrating a lack of "preparedness," Jayco's refusal reveals some understanding of commercial morality.

The additional reference of the Court to a July, 1976 complaint letter to Savin seriously misconstrued the nature of the communication and its context.[22] In fact, it appears that the Court of Appeals merely "lifted" the editorialized quotation from the Brief of the Appellee below.

The Fifth Circuit quoted a misleading

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[22] Ex. R.

portion of an entire thought. The Court misstated that in July, 1976, Woznick had written Savin that Jayco:

> "...was not in a position to rent 750 copiers--even if [it] were able to obtain ample machines."

Jayco Systems, supra at 314.

Unfairly, the entire sentence is not reflected as it appeared in Mr. Woznick's letter. Specifically, the entire sentence is as follows:

> "...[Jayco is] not in a position to rent 750 copiers-even if we were able to obtain ample machines-especially on a rental program for less than the 300 bond!"

Moreover, the letter's initial paragraph makes evident that Jayco did want additional machines:

> "[w]e have had many adversities to overcome, including the obtaining of sufficient Savin 750's...."

Mr. Woznick continues:

> "...our commitment to Savin becomes more insurmountable when we consider competition from the branch itself, as well as the new dealers who need only to operate their business with the new 750 copiers and not fight the perils of the Savin 300 program."

Mr. Woznick emphasizes his complaint about Savin's lack of integrity for breaching a non-competition agreement for which Jayco had already paid $50,000.00. Jayco's obvious complaint concerned Savin's breaches of its non-competition covenant and the unmerchantable Model 300. Mr. Woznick's letter should also be measured against his unequivocal testimony:

> "Jayco was a profitable business enterprise in every aspect except for the Savin 300 Series, which

> were not profitable for anyone... Jayco was a going concern, had good credit, and was seeking a dependable and reliable copier which could be obtained in order to bid for a large rental fleet business."[23]

Mr. Woznick's testimony is consistent with Ms. Colleen Collins' expert opinion.

An even more egregious example of the Court's capriciousness is its misplaced reliance on the deposition of Mr. Bishop, a lower level RepublicBank lending officer. The Court embraces Mr. Bishop's non-expert testimony regarding Jayco's financial preparedness, despite critical testimonial deficiencies:

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[23]Ex. G at 12-13.

(1) Savin disavowed Mr. Bishop as its expert witness;[24]

(2) Bishop had no knowledge of the State of Texas contract business;

(3) Bishop never ran a credit check on the Woznicks or Jayco;

(4) Bishop did not consider Woznick's guarantee or credit status;

(5) Bishop knew nothing about Jayco or the Woznicks.[25]

It is wrong that the Court of Appeals rejected as totally unmeritorious, the opinion of Ms. Collins, an expert with first-hand knowledge of the parties, the market and the financial requirements for the specific contracts. On the other hand, it is stulti-

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[24]Ex. S at 68 (District Court summary judgment hearing)(Savin disavows Bishop as its expert).

[25]Ex. T at 41-44, 48-49, 59-60, 66.

fying that the Court welcomed the unconsidered comments of a banker: (1) who had a lesser posture and authority; (2) who had no first-hand information; and (3) who had not reviewed any of the relevant documentation.

The Court also "holds" that Jayco never approached anyone about financing the purchase of the necessary machines. Jayco Systems, supra at 315. This "holding" ignores the following uncontroverted facts:

> (1) Jayco had approached Savin about obtaining an assurance of machine availability;
>
> (2) Mr. Woznick testified that he never communicated with any representative of Republic National Bank regarding the copier business;
>
> (3) Jayco had been a profitable business enterprise in every respect except for the unmerchantable Model 300's;
>
> (4) Jayco had a good credit rating;

(3) Jayco had been a profitable business enterprise in every respect except for the unmerchantable Model 300's;

(4) Jayco had a good credit rating;

(5) Jayco had begun planning with its banker to acquire a dependable and reliable copier in order to bid for a large rental fleet; and,

(6) Jayco sold many of its assets, less obligations, for several hundred thousand dollars in January of 1981.[26]

Those facts reveal a business which was financially able to undertake the State business. Critically, the State never questioned Jayco's financial preparedness.[27]

Finally, Jayco's failure to submit a bid did not reflect a lack of preparedness.

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[26]Ex. G; I; Ex. Q.

[27]Ex. E at 27, 39.

Rather, testimony reveals that the failure resulted from: (1) Savin's refusal to supply the machines; (2) Savin's threats of termination; and (3) an absence of competitive copiers.[28]

The Court of Appeals cannot expect Jayco to submit a bid which Jayco knew that it could not fulfill without an available copier supply. The Court's speculative position is inconsistent with business practices and summary judgment standards.

The errors of the Court of Appeals are clearly erroneous and resulted in an improper and an unfair disposition.

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[28]Ex. G at 8-12; Ex. J at 3-7.

B.

The Court Of Appeals Erroneously Applied A New Rule 56 Standard In Determining That The Unique State of Texas Governmental Copier Business Did Not Constitute A Relevant Submarket For Antitrust Analysis.

First, and foremost, Savin presented no summary judgment evidence of any nature in connection with the relevant market issue. On the other hand, Jayco's expert economist gave a testimonial definition.

Dr. Shelby Hunt, the Editor-in-Chief of the Journal of Marketing defined in detail the relevant market.[29] The Court of Appeals erroneously summarized Dr. Hunt's testimony

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[29]Ex. V at 77-81.

as no more than a reference to the "convenience copier market." Jayco Systems, supra at 319. This ignores: (1) Savin's failure to submit any summary judgment evidence on the relevant market; (2) the reality that all commerce occurs in some market; and (3) the significant evidence of the relevant submarket in the record.

First, this Court has held that a summary judgment was erroneous although the Plaintiff's complaint did not even allege a relevant market. Poller v. Columbia Broadcasting System, supra at 474. Furthermore, the relevant market definition is virtually always a question of fact. See Seidenstein, M.D. v. National Medical Enterprises, 769 F.2d 1100, 1106 (5th Cir. 1985).

This Court has recognized that an element of "fuzziness" would seem inherent in any attempt to delineate relevant markets. U.S. v. Connecticut National Bank, 418 U.S. 656, 669, 94 S.Ct. 2788, 2796, 41 L.Ed.2d 1016 (1974). Thus, a party need only supply a "rough approximation" of...markets in meeting its burden at trial. Id. at 2797; accord, C.E. Services, Inc. v. Control Data Corp., 759 F.2d 1241, 1245-46 (5th Cir.), cert. denied, _____ U.S._____, 106 S.Ct. 604, ___L.Ed.2d___ (1985). (Approach definition with trepidation). The approximations in this case are not rough. They are well-defined. Savin's absolute control over the State of Texas contract awards and pricing underscores the validity of Jayco's market definition.

Dr. Hunt testified that the "convenience copier market" consisted of copy machines performing less than 30 copies per minute, relatively inexpensive and low volume machines, and generally plain paper bond copiers. Dr. Hunt contrasted this market with: (1) "copy duplicator type machines" which are significantly faster and a higher volume unit; and (2) "duplicator machines" which are an even higher volume, yet. Dr. Hunt testified that Savin machines competed in the lower volume market, thirty (30) copies per minute or less.

Dr. Hunt also recognized that in 1976 the Model 700 series had no effective competitors. Dr. Hunt's research revealed that the machine was outstanding, well-received in

the marketplace, very reliable and very inexpensive. Competitor's machines could not effectively compete on price, performance or reliability with the Savin machines. Those machines that could compete would be much more expensive than the Savin machines.[30]

Dr. Hunt further defined the relevance of this product in terms of the State of Texas copier business and the opportunities for Savin dealers to compete for the State of Texas business. Importantly, Savin never made an evidentiary challenge to Dr. Hunt's definition of the relevant market. Neither did the witnesses.

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[30]Note 14 supra; See Ex. V at 79-81.

In developing the relevant market definition, it is well-recognized that circumscribing market power is the "ultimate consideration." Ball Memorial Hosp. v. Mutual Hosp. Ins., 784 F.2d 1325, 1336 (7th Cir. 1986). Further, current sales do not always indicate power over sales or over "tomorrow's prices." Id.; See also U.S. v. General Dynamics Corp., 415 U.S. 486, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974).

Market power herein is properly analyzed in an uncommon circumstance where no interbrand competition acted as a check on intrabrand restraints. The consumer welfare, [state agencies] was seriously cheated by supracompetitive prices.[31] See Affiliated

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[31]Ex. M at 11; Ex. K at 26-27; Ex. V at 80-81.

Capital Corp. v. City of Houston, 735 F.2d 1555, 1558-63 (5th Cir. 1984)(en banc), cert. denied, ___ U.S. ___, 105 S.Ct. 1164, 84 L.Ed.2d 316 (1986).

A past Savin State of Texas copier business manager, Mary Wilson, underscored Savin's virtual "strangle-hold" over the State's convenience copier market: (1) Savin's reign was absolute during the relevant annual rental contract periods; and (2) virtually absolute in the open-market purchases. Although the State received a plentitude of open-market requests, Savin dominated 95% of the bids on which it competed.

According to Ms. Wilson, Savin's monopoly control over the State of Texas copier busi-

ness was the product of four (4) symbiotic factors: (1) a superior copier in a price range "all its own;" (2) power over pricing; (3) restraints on dealer competition; and (4) unshakeable "political" relationships with certain State of Texas officials. Savin's domination allowed Ms. Wilson to successfully bid Savin copiers to the State for approximately $4,800.00 at a time when general retail customers could purchase the same machine in Houston, for instance, for approximately $2,200.00.

Finally, Ms. Wilson confirmed that had Savin [or Jayco] ever lost any Texas State annual rental contract, no return of machines was likely. Therefore, the loss of an annual rental contract was not synonomous with the

return of rental machines as speculated by the Fifth Circuit. Jayco Systems, supra at 315. In fact, such a return was unlikely, for the agency generally continued to use the machine so long as it properly performed.[32]

Second, Jayco, in its own Motion for Summary Judgment, explicitly defined the relevant sub-market as: (1) bids on the State of Texas annual rental contracts; and (2) the "open market" sales by Savin to State agencies. [33]

Testimonial support of Jayco's relevant market definition has been consistent and

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[32]Ex. M at 3-20.

[33]Ex. W at 3-18; Ex. X at 1-3.

uncontroverted. For example, Ms. Wilson unequivocally testified that between 1976 and 1981, the Savin operated in a competitive vacuum.[34]

Underscoring Ms. Wilson's testimony was that of Larry Stutes, a previous Savin Area Manager who supervised Savin's State of Texas photocopier business after 1976. To begin, Mr. Stutes was cognizant that several independent Savin dealers who agreed not to compete for the State copier business were often "fierce" day-to-day competitors.

Moreoever, Mr. Stutes testified that there was no effective competition for the

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[34]Ex. M at 3-20.

Savin 700's during 1975-1979. For its price, the machine was the most reliable in that particular market. In fact, the only competition for the sale of Savin equipment was from other Savin distributors in a given territory, such as Dallas. Finally, and critically, Mr. Stutes testified that Savin was "king" of the convenience copier industry in the United States, outplacing both Xerox and IBM combined. Thus, Mr. Stute's first-hand knowledge confirms that Savin copier equipment dominated the marketplace. [35]

Complementing Jayco's definitional arsenal was Bob Mayes, an original conspirator. Mr. Mayes confirmed that: (1) Mr.

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[35] Ex. L at 2, 5, 7-9, 15-16, 17-18.

Jerry Andreff of Jayco had extensive experience in the State copier business; (2) Mr. Andreff had managed the State of Texas contracts for Saxon prior to joining Jayco; and (3) Jayco intended to bid on the State of Texas business.

Mr. Mayes also testified that the State paid $4,600.00, or more, per Savin copier at a time when the general retail public could purchase the same machine for $4,000.00 or less. As Mr. Mayes noted, the Savin price-fixing arrangement was profitable for the Savin "cartel" and costly for the State of Texas.[36]

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[36]Ex. K at 2-27.

Savin dominated annual and open market contracts for the Texas governmental copier market for contracts under 75,000 copies per month. Savin created its monopoly by and through its: (1) "special" relationship with certain State officials; (2) unique product and "marketing" scheme; and (3) effective "snuffing-out" of competition from its own independent dealers. See Graphic Products Distributors v. Itek Corp., 717 F.2d 1560 (11th Cir. 1983).[37]

Uncontroverted testimony makes Savin's pervasive and perverted dominance of the State copier business painfully obvious. Savin's product had no equal and it prevented

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[37]Note 36, supra.

all other potential competitors from "cracking the entry barriers." Savin's price control rewarded the Savin conspiracy with prices substantially steeper than those available in the general retail copier market. Therefore, the State of Texas business was, indeed, the relevant antitrust submarket.

II.

The Court Of Appeals Erred In Determining That The Rule Of Reason Rather Than The Per Se Rule Applied In Circumstances Involving Conspiratorial Bid-Rigging, Price-Fixing And Agreements Not To Compete

The Court of Appeals recognized that price-fixing, resale price maintenance, group boycotts and certain types of reciprocal dealing all receive per se treatment. Yet,

the Court inexplicably evaluated those claims herein under the rule of reason.

The Fifth Circuit's resort to the rule of reason unjustly rewarded Savin, who: (1) denied the occurrence of the restraints; and therefore, (2) offered no pro-competitive justifications. Thus, Savin failed to satisfy those conditions precedent.

Perhaps the Court was abandoning the long-established per se treatment of price-fixing conspiracies. In any event, the Court's faulty analysis was glaring in its generous predisposition to forgive Savin for its pernicious conduct.

First, price-fixing remains per se unlawful. See Arizona v. Maricopa County

Medical Soc., 457 U.S. 332, 102 S.Ct. 2466, 2474-75, 73 L.Ed.2d 2048 (1982). Moreover, the retail price maintenance maintained by the Savin combination in regard to "open market" sales of copiers and supplies similarly is deserving of per se treatment. Id.; accord, Greene v. General Foods Corporation, 517 F.2d 635 (5th Cir. 1975), cert. denied, 424 U.S. 492, 96 S.Ct 1409, 47 L.Ed.2d 348 (1976).

Second, a per se violation occurs when a refusal to deal or an act to terminate a customer comes at the behest of the customer's competitor. Id. 317-18. Nonetheless, the Court ignored explicit testimony of termination threats by Savin representatives were at the behest of Mr. Jim Lawson, a Savin

dealer who controlled the "open market" copier business.[38]

It is difficult to fathom such threats could reflect a "competitive policy" that is anything but pernicious. Surely, it has no conceivable redeeming virtue. For that reason, Savin's actions should be evaluated under the per se standard. See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977). Moreover, since Savin offered no procompetitive evidence or rationale for even the non-price restraints, it forfeited any refuge under the rule of reason. See also Graphic Products Distributors, supra at 1575-77.

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[38]Ex. M at 6, 10-11; Ex. N at 31-34.

The Savin combination has thus far been excused for its patently unlawful conduct. Neither Jayco nor the taxpayers of the State of Texas deserve such unwarranted punishment.

III.

The Court Of Appeals Erred In Applying An Erroneous Rule 56 Standard In Failing To Render A Summary Judgment On Jayco's Antitrust Claims In View Of: (1) Undisputed Admissions By Conspirators Of Their Personal Participation In The Bid-Rigging; (2) Undisputed Interest And Uncontroverted Preparedness; And (3) Uncontroverted Expert Opinion On The Extent Of Damages.

Jayco more than amply demonstrated its right to a judgment based upon the uncontroverted facts herein.

Jayco is cognizant that because antitrust defendants nearly uniformly deny any wrong-

doing, antitrust plaintiffs are infrequently granted summary judgment in their favor. Moreover, it is unusually difficult, if not impossible, for an antitrust plaintiff to secure direct evidence of a defendant's illegal actions.

Nonetheless, this particular case presents uncontroverted evidence of: (1) conspirator's confessions of antitrust violations; (2) ex-Savin management admissions of wrongdoing; (3) Jayco's interest, experience and financial readiness to obtain the State copier business; and (4) an expert opinion on damages by Mr. Pat Loconto, an antitrust expert.[39]

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[39]Ex. O at 2-11.

Savin presented no controverting testimony as to any of the above evidence. First, no Savin expert disputed Mr. Loconto's expert opinion. Second, no Savin expert controverted Ms. Collins' opinion that Jayco was prepared to service the bid.

In sum, Jayco's competent summary judgment evidence was never controverted by Savin. Jayco was, therefore, entitled to have a judgment rendered in its favor. Rule 56 should be equally applied against antitrust defendants. e.g., Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416, 80 L.Ed. 2013 (1945); Penne v. Greater Minneapolis Area Bd. of Realtors, 604 F.2d 1143 (8th Cir. 1979).

In the instant suit, the Fifth Circuit stretched the limit of Rule 56 to its

breaking point in order to sustain Savin's summary judgment awarded to Savin by the District Court. Jayco is not asking this Court to likewise expand Rule 56's standard in evaluating its right to summary judgment. Jayco simply requests that the Supreme Court apply the appropriate standard.

There is no doubt that in the State convenience copier market: (1) Savin precluded competitive bidding; (2) Savin had the willing participation of some State officials; and (3) Savin dealers were actually threatened with termination for simply submitting a competitive bid. The affidavits and testimony of those witnesses are relatively brief and Jayco prays that the Court will review them in their entirety.

The Court of Appeals' holding that Savin acted through Uni-Copy, who only served as Savin's agent for submitting bids, is a major error. Rather than a mere agent, the conspiring Austin dealer managed the entirety of the market.

The relationship between Savin and the Austin dealer, initially Modern Methods and later Uni-Copy, resulted in price manipulation. See Greene, supra. Savin's participation was extremely limited from 1976 and for several years thereafter. Savin did not have: (1) any office in the State of Texas; (2) any corporate service capabilities in the State; (3) any salesmen in the State; and (4) did not submit "open market" bids.[40]

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[40]Ex. K at 10-11.

More importantly, annual bids were submitted only after due deliberation between Savin and Uni-Copy regarding the price to be bid.[41]

On the other hand, the Austin dealer, in combination with other Savin dealers: (1) submitted all "open market" bids; (2) installed all machines throughout the State; (3) performed service and maintenance on all machines throughout the State; (4) responded to agency complaints; and (5) marketed the sale and rental of Savin copiers and supplies. The Savin Corporation performed none of those functions. Savin's role was limited to: (1) processing paper work for the billing; and (2) unlawfully submitting an

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[41] Ex. M at 4-7.

annual rental bid in conspiracy with the Austin dealer.[42] Savin failed to achieve the "agency exception;" rather its conduct constituted price-fixing. See Greene, supra.

The violations are uncontroverted. Jayco's historical state participation was uncontroverted. The Savin conspiracy's absolute control over the State business was uncontroverted. Mr. Locoto's damages opinion was uncontroverted. In view of those uncontroverted facts, Jayco is entitled to have judgment rendered in its favor.

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[42]Ex. U at 5-6.

CONCLUSION

The Court of Appeals failed to apply the proper Rule 56 standard in evaluating both Savin's and Jayco's Motions for Summary Judgment. On the one hand, the Court indulged inferences in favor of the movant, Savin. On the other hand, the Court refused to apply the appropriate Rule 56 standard to the uncontroverted claims of Jayco. The result is a terribly unjust opinion which unabashedly tolerates a flagrant restraint of trade. The State of Texas taxpayers paid supra-competitive prices for copiers and supplies.

No party to this case has labored under any misconception. Yet, Savin failed to controvert the stinging admissions of a Savin bid-rigging conspiracy in full flower.

Jayco understands that the policy of the antitrust laws is to encourage interbrand competition. Where, as here, interbrand competition did not exist, intrabrand competition became the sole source of consumer satisfaction.

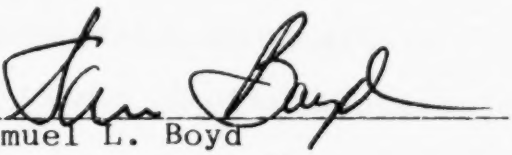
Savin's unlawfully obtained control over the State's annual rental contracts and the "open market" bids for convenience copiers and supplies should attract the attention of this Court.

WHEREFORE, PREMISES CONSIDERED, Jayco respectfully prays that the Supreme Court grant its Petition for a Writ of Certiorari, that the Supreme Court reverse the Judgment of the Court of Appeals, that the Supreme Court render judgment in favor of Jayco on

its claims under both Sections 1 and 2 of the Sherman Act, and for such other and further relief, whether at law or in equity, to which Jayco is justly entitled.

Respectfully submitted,

BOYD & FULTS

By: 
Samuel L. Boyd


Priscilla E. Perry

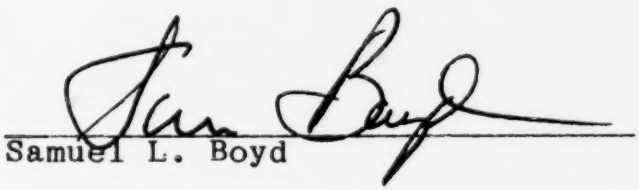
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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Writ of

Certiorari has been served on this the 28th day of April, 1986, on counsel for the Respondent by personal service.



Samuel L. Boyd